Supreme Court, U.S.
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CASE NO.

THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1993 TERM

Ethel L. Pusey
Petitioner

v.

The City of Youngstown, Ohio, Maureen Cronin
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN FAILING TO RECOGNIZE THAT THE OHIO GENERAL ASSEMBLY CONFERRED A PROTECTABLE CONSTITUTIONAL INTEREST IN ACCESS TO THE COURTS UPON VICTIMS OF VIOLENT CRIME BY OPERATION OF OHIO REV. CODE SECTIONS 2937.081 AND 2943.041?

II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE PROSECUTOR WAS PROTECTED BY ELEVENTH AMENDMENT IMMUNITY WHERE THERE WAS NO ALLEGATION OF QUASI-JUDICIAL MISCONDUCT AND THERE WAS A CLAIM FOR PROSPECTIVE INJUNCTIVE RELIEF?

III. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE CITY WAS PROTECTED BY ELEVENTH AMENDMENT IMMUNITY DESPITE THE FACT IT FAILED IN ITS ADMINISTRATIVE DUTY TO PROVIDE ADEQUATE TRAINING TO ITS PROSECUTORS AND WHERE THERE IS A PATTERN OF UNCONSTITUTIONAL CONDUCT WITHIN THE DEPARTMENT?

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OPINIONS BELOW

Pusey v. City of Youngstown, Case No. 4:92-CV-0912 (Manos, J.) Oct. 19, 1992 (appendix A)

Pusey v. City of Youngstown, 11 F.3d 652 (6th Cir. 1993), pet. for rehng. and rehng. en banc denied Feb. 3, 1994 (appendix B).

STATEMENT OF JURISDICTION

On December 15, 1993, the Sixth Circuit Court of Appeals entered its decision affirming, on different grounds, the lower court's dismissal on summary judgment of the Petitioner's claim that the City of Youngstown violated rights secured to her under the First and Fourteenth Amendments to the United States Constitution. On February 3, 1994, the Sixth Circuit Court of Appeals denied the Petitioner's Request for Rehearing and Suggestion for Rehearing En Banc. (Appendix C.)

This Court has jurisdiction to entertain this petition pursuant to 28 U.S.C. § 1254(1).

Jurisdiction in the district court was proper pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL AND OTHER PROVISIONS RELIED UPON

United States Constitution, First Amendment, Section 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983

> Civil action for deprivation of rights. Every person who, under color of any statute,

ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, and Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ohio Revised Code Section 2937.081

(See appendix D.)

STATEMENT OF THE CASE

The Ohio General Assembly has vested in the victims of violent crime the right to notice and an opportunity to be heard in a court of law at the dispositional stage of charges against perpetrators of such crimes. The Sixth Circuit Court of Appeals, in its decision in Pusey v. The City of Youngstown, has stripped these victims of all federal protection conferred by the State of Ohio and has abandoned the historic role of the federal judiciary as the protector of the citizens of the United States from the arbitrary deprivation of rights by state governmental officials.

The Petitioner, Ethel Pusey, is the mother of a murder victim. On August 12, 1991, Mrs. Pusey's son, Derrell, was shot in the back of the head while lying face down on the ground at Grief Brothers Steel Drum Company in Youngstown, Ohio, by a person alleged to be a security guard. The killer, Eric Bator, was charged with involuntary manslaughter, a violation of Ohio Revised Code section 2903.04 and a felony of the second degree. A preliminary hearing in relation to the involuntary manslaughter charge commenced in the Municipal Court in Youngstown, Ohio on September 24, 1991. At the request of the prosecutor, in open court and on the record, the hearing was recessed from September 24, 1991 until October 2, 1991.

On September 26, 1991, two days after the hearing was continued, Mrs. Pusey filed a written memorandum with the prosecutor pursuant to Ohio Revised Code 2937.081. Entitled "Duty of prosecutor to give victims of crime notice

of certain facts concerning resulting prosecution; procedure; limit," the statute provides that:

> . . . a prosecutor . . . shall notify the victim [or next of kin] of . . . the date, time, and place at which the prosecutor will enter a nolle prosequi pertaining to the offense or count, at which a plea of guilty or no contest will be entered, or at which final disposition of the offense otherwise will be made.

Ohio Rev. Code § 2937.081(B) (emphasis added). The mandatory duty to provide a victim notice of a nolle hearing is triggered when the victim provides:

> a written memorandum that includes the address at which the notice can be sent to the victim, a home telephone number, and if applicable, a business telephone number at which the victim can be contacted, and the days of the week and general times of day at which the victim can be contacted, and the days of the week and general times of day at which the victim can be

> contacted at each telephone number provided.

Ohio Rev. Code § 2937.081(E). It is undisputed that Mrs. Pusey provided a written memorandum to the prosecutor that satisfied every requirement of the statute.

Once notified of the date, time, and place, the victim is able to attend the "nolle" hearing. At the nolle hearing, the court is required by statute to allow the victim to make a victim impact statement. Entitled "Rights of crime victim in regard to prosecution of defendant," the statute provides in relevant part:

> if the charge is resolved without trial through the entry of a nolle prosequi, through the entry of a plea of no contest, or through any other final disposition other than by trial, the court shall determine whether [the next of kin] is present at the hearing or proceeding at which the charge is resolved. If the court determines that the [next of kin] is present at the hearing or proceeding, the court shall require the [next of kin's] name and the fact that he was present at the hearing or proceeding to be indicated in

> the record of the case, shall provide the [next of kin] with [certain written materials provided in 2943.081(B)], and shall inform the [next of kin] that he is entitled to make a statement relative to victimization and, if applicable, to the sentencing of the offender, and the court, subject to any reasonable terms and conditions it imposes, shall permit the [next of kin], if he so desires, personally to make such a statement.

Ohio Rev. Code § 2943.041(A) (emphasis added).

In other words, if a victim provides a prosecutor with the proper written memorandum, the prosecutor has a mandatory duty to provide notice of a nolle hearing, and, at the hearing, the court is required to allow and the victim is entitled to make a statement relative to victimization. The victim impact statement is to be made before the prosecutor nolles the charge and before the court accepts the reduced charge. This is because once a plea is accepted, jeopardy attaches to the former charge and the purpose of the victim impact statement, which is to inform the decision whether to recommend and accept a reduced or nolled plea and the appropriate sentence for the criminal defendant, is lost. This bundle of rights is deemed so important that the Ohio

General Assembly includes them within its "Victims Bill of Rights."[1]

On September 26, 1991, the day Mrs. Pusey provided her memorandum, the prosecutor assured her that no final disposition would take place in advance of the October 2, 1991 hearing. Instead, she was advised that there would be a status conference on September 27, 1991.

However, on September 27, 1991, pursuant to the prosecutor's authorization, without advance notice to Mrs. Pusey, and in violation of her express duty under Ohio Rev. Code section 2937.081, the prosector entered a nolle prosequi to the charge of involuntary manslaughter and charged Mr. Bator under Ohio Rev. Code section 2903.05, a misdemeanor. A finding of guilty was accepted by the court and sentencing was set for December 13, 1991. It is undisputed that Mrs. Pusey was not present at the nolle hearing. Nor is it disputed that Mrs. Pusey never had the opportunity guaranteed her under Ohio law to make a victim impact statement before the court determined whether to accept the reduced charge.

On October 1, 1991, Mrs. Pusey filed a complaint seeking a Writ of Mandamus in the Ohio Supreme Court, requesting the Court to direct the Defendants to comply with

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[1] See Ohio Rev. Code § 109.41, entitled "Victims' rights pamphlet; publication and distribution; costs." Section 109.42(A) refers to the publication of the collective victims' assistance rights as a "bill of rights" and includes within its provisions specific reference to the notification provisions of Ohio Rev. Code § 2937.081. See Ohio Rev. Code § 109.42(A)(5), (6), and (7).

their statutory duty under section 2937.081. Unfortunately, the Supreme Court did not rule on the Complaint in advance of the killer's sentencing hearing. Accordingly, on December 12, 1991, with the sentencing hearing scheduled to go forward on December 13, 1991, Mrs. Pusey dismissed the Complaint in Mandamus and filed an application for a temporary restraining order in the United States District Court for the Northern District of Ohio, alleging that the failure to provide her with notice of the nolle hearing violated her substantive and procedural due process liberty rights to access to the courts and of her First Amendment right to freedom of expression. Mrs. Pusey sought judicial relief in the State courts despite the fact that, under Ohio law, jeopardy attached to the counts dismissed pursuant to the nolle prosequi when the court accepted Bator's plea of guilty. Thus, although she attempted to avail herself of post-deprivation relief, the constitutional deprivation was irreparable after the nolle hearing, thus rendering inadequate Mrs. Pusey's post-deprivation remedies.

Mrs. Pusey filed an action under 42 U.S.C. section 1983 in the United States District Court for the Northern District of Ohio, Eastern Division, basing jurisdiction on 28 U.S.C. section 1331, alleging a deprivation of her constitutional right to access to the courts secured by the First and Fourteenth Amendments to the United States Constitution. The District Court granted the City's motion for summary judgment, despite the presence of a Rule 56(f)

affidavit on the record, and was affirmed, on other grounds, in the Sixth Circuit Court of Appeals.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE OHIO GENERAL ASSEMBLY CONFERRED A PROTECTABLE CONSTITUTIONAL INTEREST IN ACCESS TO THE COURTS BY OPERATION OF OHIO REV. CODE SECTIONS 2937.081 AND 2943.041.

The Court of Appeals held that the Ohio victims' rights statute does not create a protectable procedural or substantive due process right in access to the courts because it only provides that the victim has the right to be notified; it does not specify how the impact statement must affect the nolle hearing nor does it require a specific outcome based on the content of the statement. Pusey v. City of Youngstown, 11 F.3d 652, 656 (6th Cir. 1993). In addition, the Court held that the failure to provide notice to Mrs. Pusey "did not prohibit her from attending the hearing or speaking at the hearing." Id. at 657.

This Court should grant certiorari to resolve a conflict between the Sixth Circuit and the Fifth Circuit and to clarify its holding in Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454 (1989).

In Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454 (1989), this Court held that "the most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official decisionmaking, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." Id. at 462 (quoted in Pusey, 11 F.3d at 656) (emphasis court's). The Sixth Circuit apparently interpreted this language to mean that unless section 2937.081 dictated the result of the nolle hearing and foreclosed the exercise of judicial discretion, no constitutional interest existed. ("The statute does not specify how the victim's statement must affect the hearing nor does it require a particular outcome based on what the victim has said.") Id.

The Court of Appeals misconstrued the rule announced in the Thompson case, first, by focusing its inquiry on the hearing phase of the plea reduction process rather than the notification requirement that enables the victim to attend the hearing. Moreover, the Court based its analysis on the statutory duty imposed on the judge, when the plain language of section 2937.081 imposes the duty to provide notice only upon the prosecutor.[2] Further, and consistent with the Thompson holding, the statute does mandate a result when a substantive predicate is met: the

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[2] It must be noted that Ohio Rev. Code § 2943.041(A), which establishes the duties on a trial judge at a reduction hearing contemplated under Ohio Rev. Code § 2937.081(E), imposes mandatory duties on the judge as well: the requirement that the victim be allowed to make an impact statement in court. Thus, § 2943.041 provides yet another outcome mandated by the notification duty imposed upon a prosecutor under § 2937.081.

provision of notice. By focusing on a substantive result at the hearing, rather than the official conduct mandated under the statute, the Court of Appeals misapplied the Thompson holding. Finally, the Sixth Circuit confused the "substantive predicate" the satisfaction of which mandates specific official conduct, i.e., provision of a written memorandum, with the substantive right the official is obligated to protect, as evidenced by the Court's reliance on Dix v. County of Shasta, 963 F.2d 1296, 1300 (9th Cir. 1992).

The Fifth Circuit Court of Appeals examined a similar notification provision and concluded that it created a protectable liberty interest in access to the courts. In Chrissy F. By Medley v. Mississippi Dep't of Public Welfare, 925 F.2d 844 (5th Cir. 1991), the Fifth Circuit held that a statutorily-imposed duty upon a district attorney to provide notice of suspected cases of child abuse to the Department of Public Welfare, which in turn was required to communicate that notice to the Mississippi Youth Court, created a protectable interest under the First Amendment guarantee of meaningful access to the courts. Id. at 851.[3]

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[3] The Mississippi statute provided:

> Duty to inform the court. (1) Any attorney . . . having reasonable cause to suspect that a child . . . [is] an abused child, shall cause an oral report to be made immediately by telephone or otherwise, and followed as soon thereafter as possible by a report in writing to the Department of Public Welfare, and immediately a

(continued...)

The court held that where a district attorney failed to provide notice to the Department of Public Welfare as mandated under the statute, the victim's access to the courts was effectively blocked and a constitutional violation could be established. Id. Thus, the court recognized that (1) a mandatory statutory duty to provide notice that ultimately triggers judicial review confers a constitutional right; and (2) without notice, judicial review is impossible.

The Medley decision squarely recognizes that mandatory notification provisions that trigger a right to appear in court create protectable constitutional interests in meaningful access to the courts. In addition, the ruling recognizes that the fundamental right of access to the courts is not conditioned upon a prior showing of the effect that appearance will have on the relevant decisionmaker. Rather, the Constitution protects access to the judicial process; it is not conditioned upon the substantive result of that process.

Therefore, this Court should accept this case and reverse the ruling of the Sixth Circuit to protect its own pronouncement in Thompson.

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[3](...continued)

> referral shall be made by the Department of Public Welfare to the intake unit and where appropriate to the youth court prosecutor.

Miss. Ann. Code § 43-21-353 (1972 & Supp. 1990).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE PROSECUTOR WAS PROTECTED BY ELEVENTH AMENDMENT IMMUNITY WHERE THERE WAS NO ALLEGATION OF QUASI-JUDICIAL MISCONDUCT AND THERE WAS A CLAIM FOR PROSPECTIVE INJUNCTIVE RELIEF.

The Sixth Circuit held that the prosecutor was protected by Eleventh Amendment immunity because

> state criminal laws and state victim impact laws represent the policy of the state. Thus, a city official pursues her duties as a state agent when enforcing state law or policy.

Pusey, 11 F.3d at 657. The Court further stated that

> Cronin was acting on behalf of the state when she prosecuted state criminal charges and therefore her actions in prosecuting the charge, at that point, could not be attributed to the City.

Id. at 659.

This Court should grant certiorari to clarify the nature and extent of quasi-judicial conduct and to clarify the

scope of Eleventh Amendment immunity for local prosecutors.

In reaching its conclusion that Cronin was protected by the Eleventh Amendment, the Court assumed that Cronin was "prosecuting the charge" and "enforcing state law," despite the fact that there was no allegation challenging any core prosecutorial duty, such as whether to prosecute the case or the propriety of Cronin's decision to nolle the charge. Rather, the alleged misconduct was failure to provide the mandatory notice to Mrs. Pusey due under the statute. The Sixth Circuit apparently viewed this purely administrative duty as falling within the ambit of quasi-judicial conduct since only such conduct triggers Eleventh Amendment protection.

Other circuits hold that prosecutors represent the state only when they actually prosecute criminal charges. See, e.g., Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992) ("'[W]hen prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the state, not the county.'" (quoting Baez v. Hennesy, 853 F.2d 73, 77 (2d Cir. 1989)). In other words, only quasi-judicial conduct comes within the cloak of protection provided by the Eleventh Amendment.

The conduct mandated by Ohio Revised Code section 2937.081, by contrast, is not quasi-judicial in nature. The prosecutor's duty to give notice is not a core prosecutorial function because it implicates neither advocatory nor adjudicatory functions. See Joseph v. Patterson, 795 F.2d 549, 554 (6th Cir. 1986). Giving notice to victims does not

involve the decisions whether, how, or whom to prosecute, or even whether to reduce charges; it is merely an administrative task "that simply happens to be done by [prosecutors]." Sparks v. Character and Fitness Committee of Kentucky, 859 F.2d 428, (6th Cir. 1988); see also Chrissy F. by Medley v. Mississippi Dep't of Welfare, 925 F.2d 844, 850-51 (5th Cir. 1991) (no immunity for failure to provide notice to court of suspected child abuse; mandatory state statute created liberty interest in access to the courts). The Sixth Circuit's decision greatly expands the scope of Eleventh Amendment immunity by extending it to non-prosecutorial conduct of municipal officials. Accordingly, this Court should grant certiorari to define the nature and extent of quasi-judicial conduct and to clarify the scope of Eleventh Amendment immunity for local prosecutors.

The Sixth Circuit further erred in granting Eleventh Amendment immunity to Cronin where there was a claim for prospective injunctive relief. Under Ex parte Young, 209 U.S. 123 (1908), an unconstitutional act taken by a state official is not considered to be that of the state since the state is without authority to authorize an unconstitutional action. Id. at 160. The Sixth Circuit holding simply fails to apply correctly this important doctrine.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT THE CITY WAS PROTECTED BY ELEVENTH AMENDMENT IMMUNITY DESPITE THE FACT IT FAILED IN ITS ADMINISTRATIVE DUTY TO PROVIDE ADEQUATE TRAINING TO ITS PROSECUTORS AND WHERE THERE IS A PATTERN OF UNCONSTITUTIONAL CONDUCT WITHIN THE DEPARTMENT.

The Court of Appeals also held that the Eleventh Amendment barred relief against the City, reasoning that the prosecutor "acted on behalf of the state when she was prosecuting state criminal charges and reduced the charge at the September 27, 1991 hearing" because prosecutors "act[] as a state agent when prosecuting state criminal charges." Pusey, 11 F.3d at 657-58. The panel later noted that "the prosecutor's determination to notify or failure to notify is intimately associated with the hearing and is simply a litigation-related duty." Id. at 658.

This Court should grant certiorari to resolve a conflict between the Sixth and Second Circuits.

In Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), the Second Circuit held that a City Law Department's failure to execute its administrative duty to train its prosecutors does not involve core prosecutorial duties, and hence does not implicate the Eleventh Amendment. Id. at 301. There the court distinguished

between allegations concerning the actual prosecution of criminal matters, which do trigger the Eleventh Amendment, and allegations of a failure to train attorneys in a municipal law office. Id. The latter allegations "challenge[] the District Attorney's management of the office," and thus merely administrative duties that implicate only municipal, as opposed to state, interests. Id. Indeed, prosecutors have never enjoyed immunity from liability for actions taken in fulfillment of the their role as administrators or investigators. Burns v. Reed, 111 S. Ct. 1934 (1991). The Sixth Circuit's holding that the City of Youngstown enjoyed Eleventh Amendment immunity despite allegations of the Law Department's failure to train prosecutorial employees is in conflict with the Walker case.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully urges this Court to grant her Petition for Writ of Certiorari and hear these important issues on the merits.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ETHEL L. PUSEY,	)	CASE NO. 4:92CV0912
	)	
Plaintiff,	)	
	)	Judge John M. Manos
v.	)	
	)	
CITY OF YOUNGSTOWN, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OF OPINION

On May 8, 1992, Ethel L. Pusey, plaintiff, filed the above-captioned case against the City of Youngstown ("the City") and Maureen Cronin, Esq., City Prosecutor, defendants. The case was assigned to Judge Dowd. On June 25, 1992, Pusey filed a motion to reassign the case pursuant to Local Civil rules 1:2.4 and 7.09(4)(c) on the ground that it was related to an earlier case filed on December 12, 1991 which had been assigned to Judge Manos. The motion was granted.[1]

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[1]On December 12, 1991, Pusey filed Case No. 4:91CV2515 seeking a declaratory judgment, a temporary restraining order, and a permanent injunction "to protect her liberty interests within the meaning of the Fourteenth Amendment . . . and rights of expression protected by the First Amendment." On May 8, 1992, Pusey voluntarily dismissed Case No. 4:981CV2515 without prejudice.

On August 13, 1992, the City and Cronin filed a motion for summary judgment. On August 28, 1992, Pusey filed a cross-motion for summary judgment.

For the following reasons, the City's and Cronin's motion for summary judgment is granted and Pusey's cross-motion is denied.

II. Ohio Rev. Code Ann. §§ 2937.081, 2943.041.

Pusey's claims arise out of Cronin's prosecution of Eric Bator for a shooting incident in which Derrell Pusey, plaintiff's son, was killed. She claims as next of kin of a deceased victim of a violent crime she did not receive proper notification or opportunity to speak pursuant to the Ohio Rev. Code Ann. §§ 2937.081 and 2943.041. These sections delineate the rights of a victim of a crime, or of the next of kin if the victim dies, at a proceeding resolving the case.

Specifically Pusey claims she was not given any notification of a hearing held on September 27, 1991 at which the charge of involuntary manslaughter, a felony, was reduced to one of negligent homicide, a misdemeanor, by plea agreement between the prosecutor's office and Bator.

Ohio Rev. Code Ann. § 2937.081(B) provides that when a prosecutor is assigned a criminal case that includes a charge of a violation of various sections of the Ohio Revised Code, including that section regarding involuntary manslaughter, the prosecutor assigned for prosecution shall

> notify the victim of each offense or count charged of the date, time, and place of the trial pertaining to the particular offense or count, or if the particular offense or count charged is resolved without trial, the date, time, and place at which the prosecutor will enter a nolle prosequi pertaining to the offense or count, at which a plea of guilty or no contest pertaining to the offense or count will be entered, or at which final disposition of the offense or count otherwise will be made.

Ohio Rev. Code Ann. § 2379.081(B).

Ohio Rev. Code Ann. § 2943.041 provides, in pertinent part:

> In any case in which a person is charged with [various crimes not including 2903.05, negligent homicide] . . . if the charge is resolved without trial through the entry of a nolle prosequi, through the entry of a plea of guilty or no contest . . . the court shall determine whether the victim of the act that was the basis of the charge, or a representative member of the victim's family if the victim died as a result of that act, is present at the hearing or proceeding at

> which the charge is resolved. If the court determines that . . . a representative member of the victim's family is present at the hearing . . . [t]he court, in its discretion and subject to any terms and conditions it imposes, may permit the . . . representative family member to personally make a statement relative to the victimization and, if applicable, the sentencing of the offender.

Ohio Rev. Code Ann. § 2943.041.

By affidavit, Cronin swears that on September 25, 1991, she met with Pusey, received information on how to reach her, and advised her that there would be a hearing on September 27, 1991, at which the charges against Bator might be reduced. On that same day Cronin states she was contacted by Percy Squire, counsel for Pusey, and again related the information regarding the hearing. Squire advised Cronin that he would be unable to attend. Pusey and Squire deny knowledge of the hearing.

On September 26, 1991, Squire telecopied a letter to Cronin and the judge presiding over the case opposing "any further proceedings in the [case] . . . in advance of October 2, 1991." In the letter he further suggested that the case be presented to the Mahoning County Grand Jury on the next day, September 27, 1991.

On September 27, 1991, a hearing was held at which Bator's charges were reduced from involuntary manslaughter, a felony requiring notice by the prosecutor to the next of kin of a deceased crime victim, and a discretionary opportunity to be heard pursuant to statute, to negligent homicide, a misdemeanor carrying no such requirements.

As noted, Squire and Pusey did not attend this hearing and assert that they were not notified as required by statute. Pusey and the defendants agree that Cronin had all the information she needed to reach them.

A sentencing hearing was set for December 13, 1991, and Pusey was notified. She was present in court, and despite the fact that a charge of negligent homicide does not fall within section 2943.041, she was given the opportunity to present her opinions to the court.

Neither Ohio Revised Code section referred to by Pusey confers upon the next of kin of a deceased crime victim the opportunity to interfere with a plea agreement between the prosecutor and the defendant, or the acceptance of that plea by the judge. The relevant sections also do not confer on the victim's next of kin the right to determine which cases, if any, the prosecutor will present to the Grand Jury.

Section 2943.041 requires that when a victim's family member is present the court

> shall require the . . . representative family member's name and the fact that he was present at the hearing . . . to be indicated in the record of the case . . . The court in its discretion and subject to any terms and conditions it imposes, may permit the . . . representative family member to personally make a statement relative to the victimization, and, if applicable, the sentencing of the offender.

The clear mandate of the statute is that the judge must put on the record that the next of kin was present at the hearing. However, the judge has discretion as to whether to allow the next of kin of a deceased victim to speak at a hearing, and he or she may consider or not consider the next of kin's remarks in sentencing. The statute does not confer on the next of kin the right to interfere with the judge's acceptance of a plea agreement between the prosecutor and the defendant, or mandate that the next of kin's remarks be considered for purposes of sentencing.

In addition, the record shows clearly that even though the charges against Bator were such that 2943.041 was inapplicable, Pusey was given notice of the December 13, 1991, sentencing hearing and that she was present, recognized by the judge and given an opportunity to speak. Her comments are on the record and the judge was free to decide what weight, if any, to assign to her remarks when imposing sentence on Bator.

III.

Pusey files this action against the City of Youngstown and Maureen Cronin, city prosecutor, alleging that her rights under Ohio law and the constitution of the United States were violated under color of state law pursuant to 42 U.S.C. § 1983. The only basis for liability on the part of the City is respondeat superior. Under this theory, the City is not liable to Pusey for actions of the Youngstown Municipal Court. Monell v. Department of Social Services, 436 U.S. 658 (1978).

The Ohio Constitution provides that "[t]he Judicial power of the state is vested in a supreme court, court of appeals, court of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law." Ohio Const. Art. IV, § I. This section gives the Ohio legislature the exclusive authority to create municipal courts and define their jurisdictional powers. Behrle v. Beam, 451 N.E.2d 237, 238 (Ohio 1983).

"The power to establish carries with it the authority to administer those courts, including the right to provide for the appointment, status, tenure and discharge of court employees." Dugan v. Civil Service Commission of Akron, 459 N.E.2d 618 (Summit Cty. Ct. App. 1983) (citations omitted). The Ohio Supreme Court is vested with the power to supervise and promulgate rules for municipal courts. Ohio Const. Art. IV § 5.

The Ohio Constitution vests municipalities with the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Const. Art. XVIII § 3. The term "general laws" refers to laws enacted by the Ohio legislature. State ex rel. Arey v. Sherrill, 53 N.E.2d 501 (Ohio 1944).

The Ohio Constitution does not give a municipality the authority to create municipal courts or enact legislation which would affect the administration of justice. Cupps v. City of Toledo, 163 N.E.2d 384, 388 (Ohio 1959); In re Fortune, 35 N.E.2d 442 (Ohio 1941); State ex rel. Cherrington v. Hutsinpiller, 147 N.E. 647 (Ohio 1925); OAG No. 80-014. Similarly, a municipality has no authority over municipal court employees in the absence of a state legislative enactment broadening municipal powers. Dugan, 459 N.E.2d at 619.

Therefore, in Ohio a municipal court is not a subordinate part of the municipality in which it is located. Foster v. Walsh, 864 F.2d 416, 418 (6th Cir. 1988). Municipal courts are part of the state court system and are not subject to the supervision of the municipal government. Davies v. City of Lakewood, No. C87-2353 (N.D.Ohio Nov. 28, 1988).

Under 42 U.S.C. § 1983, a municipality can only be liable for acts "which the municipality has officially sanctioned or ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986). In Foster v. Walsh, 864 F.2d 416,

418 (6th Cir. 1988), the court held that an Ohio municipal court is distinguishable from the municipal corporation. The municipal court is established by the Ohio state legislature and subject to the supervision of the Ohio Supreme Court. The court further held that because Ohio municipalities cannot exercise control over municipal courts, municipalities cannot be liable under section 1983 for the actions of municipal court employees. Foster at 419; Davies, No. C87-2353 (N.D.Ohio Nov. 28, 1988).

The City of Youngstown cannot be held responsible for the acts of the Youngstown Municipal Court employees. Accordingly, all claims against the City of Youngstown are dismissed.

IV. § 1983 Official Capacity Claims

City Prosecutor, Maureen Cronin, is sued in her official and personal capacities under section 1983.

Section 1983 subjects every person acting under color of state law to liability for depriving any other person of rights, privileges, or immunities secured by the United States Constitution and federal laws. 42 U.S.C. § 1983. Despite the broad language of this statute, the Supreme Court has consistently held that section 1983 does not abolish common law immunities. Burns v. Reed, ____ U.S. _____, 111 S.Ct. 1934, 1938 (1991). The application of the immunity doctrines turns on whether the suit was brought against the person in her official capacity or her personal capacity.

In an official capacity action, the plaintiff seeks damages not from the official, but from the entity for which the official is an agent. Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S. Ct. 2304, 2311 (1989). For this reason, official capacity suits have been described as "another way of pleading an action against an entity of which an officer is an agent. . . an official capacity suit is, in all respects other than name, to be treated as a suit against the entity." Kentucky v. Graham, 105 S. Ct. 3104-05. Therefore, a state officer sued for damages in his official capacity assumes the identity of the government for which he is employed. Hafer v. Melo, ____ U.S. ____, 112 S. Ct. 358, 362 (1991).

In a personal capacity action, an individual seeks damages from the government for actions taken against them under color of state law. Kentucky v. Graham, 473 U.S. 159, 105 U.S. 3099 (1985). An official in a personal capacity suit may assert the common law defenses of absolute and qualified immunity, Graham, 105 S.Ct. at 3105, but these defenses are unavailable in official capacity suits. Id. at 3106. The only defense available in an official capacity action is sovereign immunity pursuant to the Eleventh Amendment. Id.

The Eleventh Amendment bars suits in federal court by private parties seeking damages which would be paid from public funds in the state treasury. Edelman v. Jordan, 415 U.S. 651,94 S. Ct. 1347, 1355 (1974). "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the

Federal-State balance in that respect. . . ." Will v. Michigan Dept of State Police, 109 S. Ct. at 2309.

Therefore, the Supreme Court has held that Congress did not intend to include States or their officials as "persons" under § 1983. "[N]either a State nor its officials acting in their official capacities are 'persons' under 1983." Will, 109 S.Ct. at 2312. Because state officers acting in their official capacity are not "persons" they cannot be sued under 1983. Id.

For the reasons enumerated above, the municipal court is an arm of state government. Cronin is a duly appointed prosecutor of the Municipal Court as defined in Ohio Rev. Code Ann. § 1901.34. Pusey's complaint alleges a section 1983 claim against Cronin in her official capacity. Because a state officer cannot be sued in her official capacity under this section, the claim is dismissed.

V. 1983 Personal Capacity Claims

Cronin is also sued in her personal capacity. An official sued in his or her personal capacity may assert the common law defenses of absolute and qualified immunity. Graham, 105 S. Ct. at 3105.

In Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court extended immunity to prosecutors for functions performed within the scope of their prosecutorial duties. Id. at 410; Grant v. Hollenbach, 870 F.2d 1135, 1137 (6th Cir. 1989). After reviewing the common-law rule of immunity for prosecutors and finding it to be "based

on the same considerations that underlie the common-law immunities of judges and grand jurors actions within the scope of their duties", id. at 423-24, the Court concluded that the same considerations "countenance absolute immunity under § 1983." Id. at 424.

The Court held that when "activities were intimately the judicial phase of the criminal process", a prosecutor would be absolutely immune from suit. Id. at 430.

The Supreme Court has recently revisited the issue of absolute immunity for a prosecutor when handling a criminal proceeding. In Burns v. Reed, _____ U.S. _____, 111 S. Ct. 1934 (1991), the Court held that absolute immunity attached to a prosecutor's actions "connected with the initiation and conduct of a prosecution." Id. at 1936.

City Prosecutor Cronin's actions in this case were all clearly within the scope of her duties as prosecutor and she is entitled to absolute immunity even if she neglected to notify Pusey of the plea agreement hearing.

VI.

Accordingly, the motion for summary judgment filed on behalf of the defendants, the City of Youngstown and Maureen Cronin, County Prosecutor, is granted. The plaintiff's motion for summary judgment is denied.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ETHEL L. PUSEY,	)	CASE NO. 4:92CV0912
	)	
Plaintiff,	)	
	)	Judge John M. Manos
v.	)	
	)	
CITY OF YOUNGSTOWN, et al.,	)	
	)	
Defendants.	)	

ORDER

Pursuant to the Memorandum of Opinion issued in the above captioned case this date, the motion for summary judgment filed on behalf of the defendants, the City of Youngstown and Maureen Cronin, County Prosecutor, is granted. The plaintiff's motion for summary judgment is denied.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

RECOMMENDED FOR FULL-TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 92-4185

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ETHEL L. PUSEY,
Plaintiff-Appellant,

v.

CITY OF YOUNGSTOWN; MAUREEN CRONIN,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed December 15, 1993.

Before: KENNEDY, MILBURN, and GUY, Circuit Judges.

KENNEDY, Circuit Judge. Plaintiff Ethel L. Pusey appeals the District Court's summary judgment dismissing plaintiff's claims in this 42 U.S.C. § 1983 action against an assistant prosecutor in her personal and official capacities, and against the City of Youngstown for her alleged failure to comply with Ohio's victim impact law. For the reasons stated below, we affirm.

Plaintiff filed an action against defendant Maureen Cronin, a City of Youngstown prosecutor, and the City of Youngstown, alleging that the defendants deprived her of her

First Amendment right to free speech and her constitutional right to access to the courts. Plaintiff's claims arise out of Cronin's handling of the prosecution of one Eric Bator for the death of plaintiff's son, Derrell Pusey. Bator was initially charged with involuntary manslaughter.

Ohio Rev. Code § 2937.081 requires the prosecutor assigned to certain charged crimes, including involuntary manslaughter, to provide the victim, or the victim's next of kin, with notice of the date, time and place of the trial pertaining to the particular offense or if the prosecution is resolved without trial, the date, time and place at which a guilty plea will be entered.[1]

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[1]Section 2937.081(B) provides,

> a prosecutor who is assigned for prosecution a criminal case that includes one or more charges of . . . [involuntary manslaughter] . . . shall notify the victim of each offense or count charged of the date, time, and place of the trial pertaining to the particular offense or count, or if the particular offense or count charged is resolved without trial, the date, time, and place at which the prosecutor will enter a nolle prosequi pertaining to the offense or count, at which a plea of guilty or no contest pertaining to the offense or count will be entered, or at which the final disposition of the offense or count otherwise will be made. The notification required by this division shall be provided in accordance with division (E) of this section.

Section E provides that the prosecutor may give notification either by mail or orally. See Ohio Rev. Code § 2937.081(E).

On September 27, 1991, at a status conference on the case, Cronin entered a nolle prosequi to the charge under Ohio Rev. Code § 2903.04 (involuntary manslaughter) and charged Bator under section 2903.05 (negligent homicide). Bator pleaded no contest to the reduced charge and the plea was accepted by the municipal court. The court scheduled sentencing for December 13, 1991. Plaintiff was not present at the September 27, 1991 hearing.

Plaintiff and her counsel claim Cronin deprived plaintiff of her constitutional rights by failing to notify her that the charge would be reduced at the September 27, 1991 hearing. Cronin, in her affidavit in support of her motion for summary judgment, states that Cronin met with plaintiff on September 25, 1991, and advised plaintiff that there would be a status conference with the judge on September 27, 1991, at which time the charges might be reduced.[2] Her affidavit also states that she orally advised plaintiff's attorney of the status conference.

Ohio Rev. Code § 2937.081 does not require a prosecutor to provide notice when the crime charged is negligent homicide. Cronin nonetheless notified plaintiff that Bator's sentencing hearing on the negligent homicide charge was set for December 13, 1991. Plaintiff attended and spoke at this hearing but the municipal court refused to allow her attorney to speak for her or to allow her to read a motion to vacate

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[2]In fact, plaintiff has failed to produce admissible evidence to rebut the statements in Cronin's affidavit that she notified plaintiff of the September 27, 1991 hearing.

Bator's no contest plea to the reduced charge.[3] Plaintiff argues that Cronin had a duty as an officer of the court to inform the trial judge that the judge's actions were in violation of plaintiff's statutory and constitutional rights.

As a result of the charge reduction and sentencing hearing, plaintiff filed a 42 U.S.C. § 1983 claim against Cronin and the City. Plaintiff alleged that Cronin's failure to notify her that the charges might be reduced, her failure to inform the judge of his obligations to crime victims at the reduction hearing, and Cronin's failure to advise the judge at sentencing that plaintiff had the right to counsel in connection with her exercise of rights under the Ohio victim

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[3]Under Ohio Revised Code § 2943.041(A), if a person is charged with certain crimes (including involuntary manslaughter, but not including negligent homicide), and that charge is resolved in any way except for trial,

> the court shall determine whether the victim of the act that was the basis of the charge, or a representative member of the victim's family if the victim died as a result of that act, is present at the hearing or proceeding at which the charge is resolved. If the court determines that . . . a representative member of the victim's family is present . . . [the court] shall inform the . . . representative family member that he is entitled to make a statement relative to the victimization and, if applicable, the sentencing of the offender, and the court, subject to any reasonable terms and conditions it imposes, shall permit the victim or representative family member, if he so desires, personally to make such a statement.

impact laws, deprived her of her First Amendment right to free speech and denied her access to the courts. Defendants moved for summary judgment on all claims which the District Court granted. This timely appeal followed.

II.

This Court reviews a District Court's grant of summary judgment de novo, "making all reasonable inferences in favor of the nonmoving party to determine if a genuine issue of material fact" exists. EEOC v. University of Detroit, 904 F.2d 331, 334 (6th Cir. 1990). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Viewing the evidence in the light most favorable to the nonmoving party, this Court must determine whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

III.

As an initial matter, we note that plaintiff cannot complain about Cronin's actions with regard to the sentencing hearing. At that time, Bator had pled guilty to negligent homicide. Ohio Revised Code § 2937.081(B) does not require that the prosecutor give notice to the victim or the victim's family when the charge involved is negligent homicide. Thus, any claim that her rights were violated with regard to the sentencing hearing is without merit.

Additionally, plaintiff alleges that the prosecutor committed a constitutional tort by failing to advise the judge at the sentencing hearing that plaintiff was entitled to assistance of counsel. There is absolutely no basis in law for plaintiff to claim that the prosecutor has deprived her of her constitutional rights because of a failure on the part of a prosecutor to correct the trial judge. Plaintiff does not point to any constitutional or statutory duty of prosecutors to tell the judge before whom they appear that the judge is wrong in his or her ruling.

Finally, plaintiff claims that the prosecutor violated plaintiff's constitutional rights by failing to inform the judge of his obligations to crime victims at the charge reduction hearing. Again, there is no constitutional or other duty on a prosecutor to correct the trial judge.

IV.

We turn then to plaintiff's claim that Cronin violated plaintiff's constitutional rights by failing to tell her that the charge might be reduced at the September 27, 1991 hearing. Under 42 U.S.C. § 1983, plaintiff must establish that Cronin deprived plaintiff of her federal statutory or constitutional rights under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980). The parties do not dispute that Cronin acted under color of state law. The only question is whether plaintiff was deprived of a federal right. Plaintiff argues Cronin has deprived her of her constitutional substantive due process rights and her procedural due process rights. These alleged rights include her liberty interest in free access to the

courts and her First Amendment right to freedom of expression.

A. Procedural Due Process

"We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State, the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989) (citations omitted). Liberty interests derive from both the Due Process Clause itself and the laws of the states. Id. Plaintiff clearly rests the establishment of her liberty interests on Ohio law. Initially, we must determine whether the Ohio crime victim's statute establishes a federally enforceable procedural right. To determine if state law establishes a protected liberty interest we must closely examine the state's statutes and regulations. To establish a liberty interest, the state law must use "'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion" of those to whom the statutory duty applies. Id. at 463. "[T]he most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official decision-making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." Id. at 462 (emphasis added).

Ohio Rev. Code § 2937.081 requires the prosecutor assigned to certain charged crimes, including involuntary manslaughter, to provide the victim, or the victim's next of

kin, with notice of the date, time and place of the trial pertaining to the particular offense or if the prosecution is resolved without trial, the date, time and place at which a guilty plea will be entered. This statute extends procedural rights, notice, to crime victims but fails "to protect a substantive interest to which the individual has a legitimate claim of entitlement." Olim v. Wakinekona, 461 U.S. 238, 250 (1983). "[A]n expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." Id. at 250. n. 12. The Ohio victim impact law does not create a liberty interest here because it only provides that the victim has the right to be notified. The statute does not specify how the victim's statement must affect the hearing nor does it require a particular outcome based on what the victim has said. See also Dix v. County of Shasta, 963 F.2d 1296, 1300 (9th Cir. 1992). Thus, plaintiff has failed to establish that Ohio Rev. Code § 2937.081 creates a constitutionally protected liberty interest.

B. Substantive Due Process

Plaintiff also argues that she suffered a deprivation of her substantive due process rights by Cronin's failure to notify her that the charge might be reduced at the September 27, 1991 hearing. The Sixth Circuit has recognized that substantive due process claims arise in a variety of contexts. Deprivations of substantive due process can be divided into "(1) deprivations of a particular constitutional guarantee and (2) actions that 'shock the conscience.'" Mansfield Apartment Owners Ass'n v. City of Mansfield, 988 F.2d

1469, 1474 (6th Cir. 1993) (citing Braley v. City of Pontiac, 906 F.2d 220, 224-225 (6th Cir. 1990)).

Plaintiff argues that Cronin's failure to notify her that the charge might be reduced subjected her to governmental action which "shocks the conscience." However, the Sixth Circuit has stated that use of the "shock the conscience" test is problematic in areas other than excessive force. Braley, 906 F.2d at 226. This case does not concern physical force, and we see nothing shocking in the prosecutor's conduct here. Plaintiff next argues that even if Cronin's actions did not shock the conscience, her failure to notify was arbitrary and capricious in violation of her liberty and expressive interests. We conclude that plaintiff's failure to notify was neither arbitrary nor capricious.

Finally, plaintiff argues that Cronin's failure to notify plaintiff that the charge might be reduced deprived her of her right to freedom of expression and access to the courts as protected by substantive due process. Plaintiff argues Cronin deprived her of her constitutional rights by failing to notify her because exercise of plaintiff's constitutional rights necessarily hinged on notification of the hearing. Even assuming that an expressive right or right to access to the courts exists in this context, we conclude that Cronin's failure to notify plaintiff did not deprive plaintiff of a particular constitutional guarantee. Cronin's failure to notify plaintiff did not prohibit her from attending the hearing or speaking at the hearing. Thus, we conclude that Cronin's failure to notify plaintiff did not deprive her of any substantive due process rights.

Cronin did not deprive plaintiff of her procedural or substantive due process rights and therefore we affirm the District Court's order granting summary judgment to Cronin and the City. Although our conclusion that plaintiff was not deprived of any federal statutory or constitutional rights requires a dismissal of her section 1983 action, we will nevertheless address alternative bases for denying liability.

V.

Initially, we address plaintiff's argument that Cronin is liable under 42 U.S.C. § 1983 in both her official and personal capacities.

A. Official Capacity

In an official capacity action, the plaintiff seeks damages not from the individual officer, but from the entity for which the officer is an agent. The Supreme Court has concluded that, "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." Kentucky v. Graham, 473 U.S. 159, 166 (1985).

The District Court granted summary judgment dismissing all claims against Cronin in her official capacity. The District Court concluded that Cronin was a state employee and suits against state officers acting in their official capacities are not cognizable under section 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). The District Court reasoned that Cronin was a state employee because she is an officer of the municipal court which is an arm of state government. However, both parties concede on appeal that

the District Court erred when it concluded that Cronin was a state employee. Rather, as both parties noted on appeal, Cronin is an employee of the City of Youngstown.

While we agree with the parties that Cronin is employed by the City of Youngstown, we nevertheless conclude that plaintiff's suit must fail as Cronin acted on behalf of the state when she was prosecuting state criminal charges and reduced the charge at the September 27, 1991 hearing. City prosecutors are responsible for prosecuting state criminal charges. See Ohio Rev. Code §§ 1901.34(C), 309.08. Clearly, state criminal laws and state victim impact laws represent the policy of the state. Thus, a city official pursues her duties as a state agent when enforcing state law or policy. Cf. Scott v. O'Grady, 975 F.2d 366 (7th Cir. 1992), cert. denied, 113 S. Ct. 2421 (1993); Echols v. Parker, 909 F.2d 795 (5th Cir. 1990). Because Cronin acts as a state agent when prosecuting state criminal charges, the suit against Cronin in her official capacity is to be treated as a suit against the state. Again, a suit against a state is not cognizable under 42 U.S.C. § 1983. Will, 491 U.S. at 71.[4]

Although the District Court granted summary judgment for Cronin in this official capacity action for other reasons, we

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[4]Plaintiff argues that even if a damages action against Cronin in her official capacity is prohibited by the Eleventh Amendment, prospective relief is not prohibited. Ex parte Young, 209 U.S. 123 (1908). Plaintiff therefore seeks relief requiring Cronin to conform with constitutional standards. While the Eleventh Amendment does not bar such a suit, prospective relief is not available because we have concluded that Cronin did not violate any constitutional guarantees. Further, plaintiff has failed to allege that she is likely to be in this situation again.

affirm the District Court's order because Cronin is entitled to summary judgment on other grounds. Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co., 772 F.2d 214, 216 (6th Cir. 1985) (per curiam).

B. Personal Capacity

Plaintiff also alleged a section 1983 action against Cronin in her personal capacity. However, an official sued in her personal capacity may assert the common law defenses of absolute and qualified immunity. Indeed, the District Court dismissed the claims against Cronin in her personal capacity, ruling that Cronin was absolutely immune from suit.

As an initial matter, we note that plaintiff appeared to concede at oral argument that Cronin is entitled to absolute immunity. However, we address this issue to make clear that prosecutors are entitled to absolute immunity for a failure to notify victims under a victim impact law.

To determine whether a prosecutor is entitled to absolute or qualified immunity for a particular act, we must examine the "nature of the function performed, not the identity of the actor who performed it." Forrester v. White, 484 U.S. 219, 229 (1988). In Imbler v. Pachtman, 424 U.S. 409 (1976), the Court held that prosecutors sued in their personal capacity under section 1983 are absolutely immune for their conduct in "initiating a prosecution and in presenting the State's case." Id. at 431. The Court reasoned that the prosecutors' "activities were intimately associated with the judicial phase of the criminal process." Id. at 430. The Court expressly reserved determination of absolute immunity

for a prosecutor when she acts in the role of an administrator or investigative officer rather than that of an advocate. Id. at 431. More recently, in Burns v. Reed, 111 S. Ct. 1934 (1991), the Court concluded that a prosecutor is not entitled to absolute immunity when acting as an administrator or investigator, for example, when a prosecutor gives legal advice to police. See also Buckley v. Fitzsimmons, 113 S. Ct. 2606 (1993).

Plaintiff argues that the prosecutor is not entitled to absolute immunity for failing to give notice to her because the duty to notify was an investigative or administrative duty. Sixth Circuit precedent has established that "the critical inquiry is how closely related is the prosecutor's challenged activity to his role as an advocate intimately associated with the judicial phase of the criminal process." Joseph v. Patterson, 795 F.2d 549, 554 (6th Cir. 1986), cert. denied, 481 U.S. 1023 (1987).

We conclude that the prosecutor's failure to notify plaintiff of the September 27, 1991 hearing, where Bator's charge was reduced and he entered a guilty plea, is within the prosecutor's function as an advocate for the state as it is intimately associated with the judicial phase of the criminal process. The court hearing where the charge was reduced and a guilty plea was entered involved a judicial act. Furthermore, the prosecutor's determination to notify or failure to notify is intimately associated with the hearing and is simply a litigation-related duty. Giving notice to witnesses, victims or defendants is certainly one of those core prosecutorial functions which is protected by absolute immunity. Indeed, plaintiff's desire to attend the reduction

hearing arose because she wanted to object to the plea arrangement and persuade the prosecutor and the judge to bind defendant Bator over to the grand jury. Her very desire in attending the hearing illustrates that the prosecutor's duty, as related to giving her notification for the reduction hearing, involved duties where the prosecutor functioned as an advocate of the state and duties which are intimately associated with the criminal process.

Thus, the District Court correctly determined that Cronin is entitled to absolute immunity from suit in her personal capacity and we affirm the order dismissing all claims against Cronin in her personal capacity.

VI.

We next address plaintiff's section 1983 claim against the City of Youngstown. Plaintiff argues "that the City caused the plaintiff's constitutional tort through inadequate training of its prosecutor and through its acquiescence in the policy or custom which deprived the plaintiff of her rights." We conclude that the plaintiff's action against the City has no merit.

After a review of plaintiff's complaint, the District Court concluded that plaintiff did not raise any cognizable claim against the City except one which derives from an allegation of wrongdoing on the part of Cronin. The District Court then granted the City's summary judgment motion to dismiss all claims concluding that the City could not be liable for any of Cronin's actions because Cronin was not a city employee. The District Court reasoned that Cronin was a

municipal court employee and that the municipal court was an arm of the state courts. Therefore, Cronin acted on behalf of the state, not the City of Youngstown. Thus, the District Court reasoned that the City could not be responsible for Cronin's actions. On appeal, both parties concede that the District Court erred when it concluded that Cronin is not an employee of the municipality. However, this Court may affirm the District Court's order granting summary judgment for the City if the City is entitled to summary judgment on other grounds. Russ' Kwik Car Wash, 772 F.2d at 216 (citations omitted).

To the extent that plaintiff's claim against the City derives from an allegation of wrongdoing on the part of Cronin, it is barred under Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978). A municipality is not liable under 42 U.S.C. § 1983 for its employees' acts on a respondeat superior theory. Additionally, as stated, Cronin was acting on behalf of the state when she prosecuted state criminal charges and therefore her actions in prosecuting the charge, at that point, could not be attributed to the City. Municipal liability arises under section 1983 for unconstitutional policies or customs. Id. Plaintiff failed to allege any unconstitutional City policy or custom in her complaint.

In appropriate circumstances, a single act may rise to the level of policy or custom. With regard to policy, a single act can constitute municipal policy "where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986). Plaintiff does not suggest that Cronin possessed final authority to establish a

municipal policy of failing to notify victims of upcoming trials or dispositions. In fact, the City Law Director is the head of the Law Department and Cronin reports to the Director. Additionally, the Director has "final supervisory and policy-making authority with respect to the Law Department." Plaintiff's Brief at 30.

Plaintiff did argue in her brief in opposition to the City's motion for summary judgment, that Cronin's failure to notify plaintiff may have been pursuant to an unconstitutional custom of the City. A course of conduct constitutes a custom when "such practices of state officials [are] so permanent and well-settled" as to constitute law. Monell, 436 U.S. at 691. The plaintiff suggested no facts to support a custom of failing to notify victims. Cronin's affidavit, which was unrefuted, states that she told plaintiff before the September 27, 1991 hearing that charges against Bator might be reduced. Under these circumstances, we see no reason to permit plaintiff to amend at this time to allege a violation of a custom or policy.

Plaintiff also contends that the City violated the plaintiff's rights by failing to provide adequate training for city attorneys, as manifested by Cronin's failure to notify plaintiff of the reduction hearing. Once again Cronin's conduct indicates awareness of her statutory duties. Again, we see no basis to permit an amendment to allege the contrary.

VII.

For the reasons stated above, we AFFIRM the District Court's order granting summary judgment for the defendants.

FILED
FEB 3 1994
LEONARD GREEN, Clerk

No. 92-4185

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ETHEL L. PUSEY, Plaintiff-Appellant,	)	
v.	)	ORDER
CITY OF YOUNGSTOWN; MAUREEN CRONIN, Defendants-Appellees.	)	

BEFORE: KENNEDY, MILBURN, and GUY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

2937.081 Duty of prosecutor to give victims of crime notice of certain facts concerning resulting prosecution; procedures; limits

A. As used in this section, "victim" means a person, as defined in section 1.59 of the Revised Code, and a governmental entity or instrumentality, that has suffered injury, damage, or death as a result of the commission of an act by another that is the basis of one or more charges of an offense listed in division (B) of this section.

B. Except as provided in division (E) of this section, a prosecutor who is assigned for prosecution a criminal case that includes one or more charges of a violation of section 2903.02, 2903.03, 2903.04, 2903.06, 2903.11, 2905.01, 2905.02, 2905.11, 2907.02, 2907.12, 2909.02, 2911.01, 2911.02, 2911.11 or 2911.12 of the Revised Code, a violation of section 2903.01 of the Revised Code in which the indictment or count in the indictment does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, or a felony violation of section 2903.07 of the Revised Code, shall notify the victim of each offense or count charged of the date, time, and place of the trial pertaining to the particular offense or count, or if the particular offense or count charged is resolved without trial, the date, time, and place at which the prosecutor will enter a nolle prosequi pertaining to the offense or count, at which a plea of guilty or no contest pertaining to the offense or count will be entered, or at which final disposition of the offense or count otherwise will be made. The notification required by this

division shall be provided in accordance with division (E) of this section.

C. Except as provided in division (E) of this section, in any case in which a prosecutor is required by division (B) of this section to notify the victim of an offense or count of the date, time, and place of the trial or other specified activity pertaining to the offense or count, and in which the trial or other specified activity is continued or otherwise changed to a different date or time or is moved to a different place, the prosecutor shall notify the victim of the continuance, change or move of the trial or other specified activity and of the new date, time, and place of the trial or other specified activity. The notification required by this division shall be provided in accordance with division (E) of this section.

D. For purposes of providing the notices required by this section, a victim of an offense, the next of kin of a deceased victim, or the parent, legal guardian, or next of kin of a victim under eighteen years of age may file a written statement with the prosecutor that designates another person as the agent of the victim, identifies the agent and the organization, if any, that he represents, and provides an address and telephone number at which the notifications can be provided to the agent and the days of the week and general times of day at which the agent can be contacted at that number, and is signed by the victim, next of kin, parent, or legal guardian. The agent may be, but is not required to be an attorney. After receipt of the written statement, the prosecutor shall provide each subsequent notification required under this section, in relation to that victim, to the

agent instead of the victim, in accordance with division (E) of this section.

E. A notice required by division (B) or (C) of this section does not have to be provided by the prosecutor unless the prosecutor, prior to the time at which the notice is required, is provided a written memorandum that includes the address at which the notice can be sent to the victim, a home telephone number, and if applicable, a business telephone number at which the victim can be contacted, and the days of the week and general times of day at which the victim can be contacted at each telephone number provided. A statement filed under division (D) of this section suffices as a memorandum for purposes of this division. If the prosecutor is provided a memorandum in accordance with this division, he shall provide each subsequently required notice to the victim, either by sending it by regular mail to the address provided or by communicating it orally, by telephone, at the number provided. However, if the prosecutor attempts to orally communicate the notice, by telephone, to the victim at each telephone number provided, but is unable to do so after at least three good faith attempts, the prosecutor is not required to make any further attempts to orally communicate the notice, send it by regular mail, or provide it in any other manner. If the notice is communicated orally, by telephone, the prosecutor shall record the telephone number called, the date and time of day of the communication, the name of the person to which the notice is given, and the content of the communication. A memorandum filed under this division may be modified by the filing of a subsequent memorandum.

F. A prosecutor satisfies the requirements of divisions (B) and (C) of this section pertaining to information and notifying the victim of the offense by notifying:

(1) The victim's next of kin, if the victim is deceased, or the victim's parent, legal guardian, or next of kin, if the victim is under eighteen years of age;

(2) An officer or agent of the person who is the victim, if the victim is not an individual or if the victim is a governmental entity or instrumentality;

(3) The three victims that the prosecutor believes have suffered the most, if there are more than three victims of the offense;

(4) The agent of the victim, next of kin, parent, or legal guardian designated in accordance with division (D) of this section;

(5) In all other cases, the victim.

G. Failure of a prosecutor to comply with the notice provisions of this section does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to the defendant.

(2)

Supreme Court, U.S.
FILED
JUN 2 1994
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CASE NUMBER 93-1772

THE SUPREME COURT OF THE UNITED STATES
OCTOBER 1993 TERM

ETHEL L. PUSEY
Petitioner

v.

THE CITY OF YOUNGSTOWN, OHIO,
AND MAUREEN CRONIN
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE OPERATION OF OHIO REVISED CODE, SECTIONS 2937.081 AND 2943.041, PROVIDE VICTIMS OF CRIME OR THEIR NEXT-OF-KIN WITH A CONSTITUTIONALLY PROTECTED RIGHT?

II. DOES A LOCAL PROSECUTOR ENJOY IMMUNITY IN HER DECISIONS AS TO WHETHER TO PROSECUTE AND ON WHAT CHARGES?

III. WHERE A COMPLAINT ESTABLISHES NO COGNIZABLE CLAIM AGAINST A MUNICIPALITY, MAY THE MUNICIPALITY BE HELD ACCOUNTABLE FOR A SINGLE ALLEGED ACT OF AN EMPLOYEE?

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STATEMENT OF FACTS AND OF THE CASE

Derrell Pusey, son of Petitioner Ethel Pusey, died as a result of a gunshot wound inflicted by one Eric Bator while Pusey was apparently attempting a robbery. Bator was employed as a security guard.

Bator was charged with involuntary manslaughter, a violation of Ohio Revised Code Section 2903.04. A preliminary hearing was set in Youngstown Municipal Court on September 24, 1991, but was continued to October 1, 1991, by Judge Patrick Kerrigan on Respondent, Prosecutor Maureen Cronin's, motion.

Ohio has certain "victims of crime" statutes, among them, Ohio Revised Code Sections 2937.081 and 2943.041. The first, Section 2937.081, requires the prosecutor assigned to certain charged crimes, in-

cluding Ohio Revised Code Section 2903.04, to provide the victim of the crime (or the "next of kin of a deceased victim," Ohio Revised Code Section 2937.081(D)) with the date, time and place of the "trial pertaining to the particular offense or count" or, if resolved without trial, the time, date and place a plea will be made "pertaining to the offense or count" OR the date, time and place "final disposition of the offense or count otherwise will be made." It is important to note that notice may be mailed or communicated orally (Ohio Revised Code Section 2937.081(E)) and is only to be provided if, "prior to the time at which notice is required" the prosecutor, "is provided a written memorandum" with information enabling the prosecutor to call or write the victim or his next-of-kin or their agent.

Ohio Revised Code Section 2843.041 provides that, "the court shall determine" for the specified charged crimes, "whether the victim of the act ... or a representative member of the victim's family if the victim died as a result of the act, is present at the hearing or proceeding at which the charge is resolved." Among other things, "the court" then informs the family member if one is present that he or she may make a statement "relative to the victimization" personally, "subject to any reasonable terms and conditions it imposes" on the family member or statement itself. There are no civil or criminal penalties provided under either statute for failure to comply on the part of the judge or prosecutor. There is no provision that failure of notification affects the criminal case in any way.

On September 25, 1991, Petitioner went to the Prosecutor's office seeking information about the Bator matter. Ms. Cronin met with her for approximately 45-55 minutes, see Affidavit of Ms. Cronin attached to Defendant's Supplemental Memo in support of summary judgment filed September 15, 1992, Docket #20. This was Ms. Cronin's first contact with Petitioner. At this meeting, Ms. Cronin not only secured Petitioner's address, phone number and days and hours of availability as required by Ohio Revised Code Section but also orally advised Petitioner a hearing was to be held September 27, 1991, at which time the charges against Bator might be reduced, see Affidavit.

On September 26, 1991, counsel for Petitioner, Mr. Percy Squire, contacted Ms. Cronin. She related this same information

to counsel, including the fact that a hearing was to be held the next day, Affidavit attached to Supplemental Memo, Docket #20. Ms. Cronin's only statutory duty was to provide oral notice to the next-of-kin or her agent of the date, time and place of hearing. This duty was now fulfilled.

Petitioner's counsel faxed to Ms. Cronin and Judge Kerrigan a letter on the afternoon of September 26, 1991, asking that he be given the notice required pursuant to Ohio Revised Code Section 2937.081. In the second paragraph of this letter, counsel further states that Petitioner's family "vehemently opposes" action in the Bator case prior to October 2, 1991, acknowledging the fact that he knew of the hearing scheduled next day. The letter also stated that Petitioner's

family wanted the case removed from municipal court and wanted instead to force its presentation to the Mahoning County Grand Jury, attachment to Defendant's Motion for Summary Judgement, Docket #16.

The hearing set for September 27 proceeded as scheduled. Petitioner failed to attend. Bator pled no contest to a local ordinance defining negligent homicide, tantamount to a violation of Ohio Revised Code Section 2903.05, a reduced charge. Sentencing was postponed until after a pre-sentence investigation.

Petitioner filed a mandamus action in the Ohio Supreme Court on October 1, 1991, against Ms. Cronin, Judge Kerrigan and the Youngstown Police Department attempting to enjoin further action against Bator until the named defendants "perform[ed] the acts

required by Ohio Revised Code Sections 2937.081, 2943.041 and 2743.712 in advance of accepting a plea from Mr. Bator," and requested an order vacating Bator's plea until Petitioner could make a statement to the Municipal Court. Petitioner's injunction was denied October 10, 1991, and she dismissed the complaint altogether on December 21, 1991, which dismissal was granted by the court eight days later.

The pre-sentence investigation hearing for Bator was scheduled December 13, 1991, at 10:00 A. M.. Even though Petitioner had no statutory right to make a statement at this hearing, the judge allowed her to, even going so far as to continue the hearing until 3:00 P. M. to allow Petitioner to have her personal counsel present, see Transcript of Proceedings, page 3, lines 5 through 7, attached to

Docket #20, Defendant's Supplemental Memo. Petitioner, herself did make a statement at this hearing, Transcript pages 8 through 10, Docket #20, Defendant's Supplemental Memo. Counsel for Petitioner objected to Petitioner making this statement as that attorney insisted he be allowed to read a prepared statement to the court in her place. Judge Kerrigan refused to allow the attorney for the next-of-kin to speak.

On or about December 13, 1991, Petitioner filed a Complaint in Federal District Court against Ms. Cronin and Judge Kerrigan. In it, Petitioner asked the district court to restrain any further Bator action and asked the court to declare that these defendants violated Petitioner's First and Fourteenth Amendment rights of free expression and access to the courts. On May 19, 1992, Petitioner dismissed this

action after filing the present action instead against Ms. Cronin and the City of Youngstown on May 8, 1992.

The present action was filed by Petitioner in Federal District Court on May 8, 1992. It purports to be filed under the auspices of 42 U.S.C. Section 1983. The complaint itself specifically alleges certain things. First, although the case is filed against only the City of Youngstown and its Prosecutor, Maureen Cronin, in paragraph 6 of the Complaint it states that the Youngstown Municipal Court is a branch of Youngstown government and the court's judges are governmental officials of the City.

Next, at paragraph 6, the Complaint alleges that Respondent Cronin (hereinafter referred to as Ms. Cronin), sued only in her official capacity, failed in her stat-

utory duty to provide notice to Petitioner of the reduction hearing held in the matter, that the judge (not made a party herein) failed to inquire whether a family member was actually present as he is statutorily required to do and that somehow Ms. Cronin had a duty to tell the judge of his statutory duty and did not. Petitioner claims these amount to a violation of her "due process rights," these amount to a denial of "meaningful access to the courts" in violation of her Fourteenth Amendment rights and that these amount to a violation of her "right of expression" under the First Amendment.

The Complaint also alleges that Petitioner was denied effective assistance of counsel in that the non-party judge failed to allow Petitioner's counsel speak for her at the pre-sentencing hearing and

Ms. Cronin failed to "counsel" the judge that this amounted to a denial of effective assistance. Due to this "failure" on the part of the judge, Petitioner says she was unable to ask the court to vacate the plea bargain and send the case, instead, to the Mahoning County Grand jury. Petitioner alleges these acts also deprived her of her liberty interest in access to the courts.

Petitioner claimed that these alleged wrongdoings subjected her to psychological and emotional distress and asked the court for compensatory and punitive damages and attorney fees.

The case was originally assigned to Judge Dowd, however, on Petitioner's motion it was reassigned to Judge Manos.

Appellees, City of Youngstown and Ms. Cronin, filed for summary judgement, claiming absolute prosecutorial immunity

for Ms. Cronin and that the City could not be held in Section 1983 under the theory of respondeat superior, the only allegations against it which can be reasonably construed from the Complaint.

Petitioner filed a motion in opposition to Respondent's motion and filed a cross-motion for summary judgement, which for the first time alleged Ms. Cronin was being sued in her personal capacity and, also for the first time, raised issues of "failure to train" on the part of the City. Respondents filed a motion addressing these claims and Petitioner filed yet another reply.

On October 19, 1992, Judge Manos granted the summary judgment filed by the City and Ms. Cronin and denied Petitioner's motion. In his Memorandum of Opinion, Judge Manos notes that neither Ohio Revised

Code Section 2937.081 nor 2943.041 give Petitioner the right to interfere with a plea agreement, the acceptance of the plea by the judge or the right to determine whether or not a particular case should go to the grand jury. Further, Section 2943.041, putting a "mandate" on "the judge" to determine whether a next of kin was present allows the judge some discretion as to that person's statement and that the judge can consider or freely ignore altogether the statement in sentencing, Memorandum Opinion at 4-5.

In his lengthy opinion, the judge held that, "The only basis for liability on the City is respondeat superior," Memorandum Opinion at 6. As the City is not responsible for the action of the judge, court or its employees, the claims against the City were dismissed.

The judge next asserts that Ms. Cronin was sued in her personal, as well as official capacity, not apparent from the Complaint. However, the Court also states that as a state officer acting in her official capacity, Ms. Cronin was immune from a Section 1983 claim in both capacities.

Petitioner timely appealed to the United States Court of Appeals for the Sixth Circuit from this decision. The Court of Appeals affirmed the District Court decision in every way and refused reconsideration and rehearing en banc. Petitioner now attempts to bring the identical claims to this honorable Court on the identical arguments asserted below.

ARGUMENT

I. OHIO REVISED CODE, SECTIONS 2937.081 AND 2943.041, DO NOT OPERATE TO CONFER A CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS.

Throughout her argument, Petitioner has asked this honorable Court to make giant leaps of faith. First, by asking it and the two lower courts to glean from the allegations in the Complaint that she is attempting to hold the City liable for failing to train Ms. Cronin, even though these allegations are not pled. Next, she asks this Court to hold the prosecutor liable not only for the duty assigned her by statute, but seeks to hold the prosecutor responsible for the statutory duties assigned to the judge and for explaining to him the state of the law.

Petitioner asks the Court to believe that after a fifty-five-minute discussion with Ms. Cronin of her own and a telephone call the day prior to the hearing her counsel made to Ms. Cronin which he followed by an incriminating faxed message, Ms. Cronin did not tell Petitioner or her counsel of the scheduled reduction of sentence hearing for Bator. Finally, Petitioner asks this Court to find that the notification statutes provides her with constitutional rights of free speech, effective assistance of counsel, "liberty interests" in access to the courts and due process rights.

It is important to distinguish at this point the differences between Ohio Revised Code Sections 2937.081 and 2943.041. Only the first statute involves the local prosecutor, Ms. Cronin. Only the second involves the municipal trial court. Ohio

Revised Code Section 2937.081 is the only pertinent statute herein because, as later discussed, the judge is not a party and the City and its prosecutor cannot be held for any failure on the court's part, including those stemming from Ohio Revised Code Section 2943.041. Ohio Revised Code Section 2943.041 is plain on its face and clearly does not devolve a duty on the prosecutor in any fashion. Due to the attempts by Petitioner to confuse the issue and attach some duty to Ms. Cronin pursuant to this statute, it is important to reiterate that for purposes of this argument, Section 2943.041 is wholly inapplicable to either named party to this suit.

The issue before this honorable Court is whether Ohio Revised Code Section 2937.081 creates constitutionally protected

rights for Petitioner. This section provides that if a deceased victim's next of kin or her agent provides a name, address and telephone number in writing to the prosecutor prior to a trial, plea by a criminal in lieu of a trial or final disposition of certain criminal actions, the prosecutor "shall" notify the next of kin or her agent of the time, date and place one of these events will take place. The statute is written in the alternative: trial or plea or final disposition of the charge. The statute places a duty on the victim's next of kin to provide information in writing. The statute says the victim's kin must provide the information "prior to" one of the above three events, but not how much prior to the events. Finally, the statute allows the prosecutor to merely telephone and, if on the third try, she

fails to contact the victim's kin, she may abandon her efforts to contact. There is no penalty provision for failure to comply with this statute, either civil or criminal. Failure to comply with this statute does not affect the prosecution of the underlying criminal matter in any way.

Petitioner would like you to believe that because the statute purports to give the prosecutor a mandatory duty, that this automatically triggers a constitutionally protected right on the part of Petitioner. Petitioner relied below heavily on Kentucky Department of Corrections v. Thompson, 490 U. S. 454, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989). Unfortunately, she did not go far enough of her analysis of the case and failed to recognize that under a Thompson analysis of the state statute, it is apparent that Petitioner has absolutely no protected rights created by statute.

As stated earlier, the statute appears to place a mandatory duty on a prosecutor. However, the duty is really a conditional one: only if she gets the proper information prior to one of three events is she to give notice, and then only for one of the three. Also, she can try telephoning and abandon her effort after three unsuccessful tries. There is no civil or criminal penalty for failure to notify and failure to notify triggers absolutely no further event (i. e., continuance of a criminal hearing, vacation of a plea, etc.)

Thompson does state that one matter to be considered is whether a "regulatory" statute contains "explicitly mandated language," 490 U. S. at 463. Thompson makes clear that this is only one part of the test. First, the statute must be

regulatory, contain specific mandates and have "substantive predicates;" "substantive limitations on official discretion," 490 U. S. at 462, citing to Olim v. Wakinekova, 461 U. S. 238, 249, 75 L. Ed. 2d 813, 103 S. Ct. 174 (1983), (where this honorable Court held that if the decisionmakers were not required to base decisions on some specific standards or guidelines, no constitutional right was involved) and Hewitt v. Helms, 459 U. S. 460, 472, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983). The statute, in order to be said to have created a constitutionally protected right, must somehow mandate the outcome the decisionmaker must follow, Thompson, 490 U. S. at 463. In other words, there must be some preordained outcome that will occur if the mandates are not followed. In Hewitt, it was that certain procedures must be fol-

lowed before prison officials could decide to administratively segregate certain prisoners. In Greenholtz v. Nebraska Penal Inmates, 442 U. S. 1, 11, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979), it was that the board of corrections must order release of prisoners unless one of four specific conditions were found.

In the case at bar, there is no such mandatory outcome. Ohio Revised Code Section 2937.081 simply states that notice is to be given, but not unless Petitioner herself takes certain actions. Notice is to be given, but only in certain circumstances for certain charges. If notice is not given ... the statute is silent. Even if Petitioner could link the duties of the prosecutor under Section 2937.081 to the duties of the judge under Ohio Revised Code Section 2943.041, the

scenario does not change. Not only is the judge's duty to some extent conditional like the prosecutor's in the earlier statute, there is absolutely no preordained outcome. Whether or not Petitioner was/was not notified, whether or not she did/did not speak, the judge was free to entirely ignore her statements. Petitioner has no ability to change or influence the prosecutor or judge. There is no kind of penalty for failure to notify or allow a victim's kin to speak. The statutes do not allow a continuance of hearing or provide the criminal defendant with an automatic or mandatory course of action for failure to comply with the statutes. Despite what Petitioner would like this honorable Court to believe, the mere recitation of language which appears mandatory (but is really conditional) does not provide her with an

automatic constitutionally protected right. The statute in question provides no "substantive" limitation on Ms. Cronin's actions the course of the criminal prosecution or the judge's action and Petitioner's arguments in this respect must fail.

Based on the above, it can readily be seen that there is no conflict between the Sixth Circuit's reading of Thompson and the Fifth Circuit's holding in Chrissy F. by Medley v. Mississippi Department of Public Welfare, 925 F. 2d 844 (5th Cir. 1991). The Medley case is readily distinguishable from both Thompson and the decision below in this matter. Here, the state has seen fit to draft a statute placing conditional duties on a prosecutor, despite the use of seemingly mandatory language. In Medley, the duty devolves on the general public and

is absolutely mandatory: every single person who comes in contact with a child and suspects child abuse must report it to state officials. It is a mandatory child welfare statute. There are no conditional phrases and at no time is anyone excused from reporting suspected child abuse for any reason. Therefore in Medley, the mandatory language is truly mandatory. Suspected child abuse victims must receive some kind of process, unconditionally.

The Ohio statute here is unquestionably conditional. As stated in Olim v. Wakinekova, 461 U.S. 238, 75 L. Ed. 2d 813, 103 S. Ct. 174 (1983), "an expectation of receiving process is not, without more, a liberty interest protected by Due Process Clause," 461 U.S. 250, N. 12. For these reasons there is no conflict between the Fifth and Sixth Circuits and Petitioner's petition for writ should not be granted.

II. A PROSECUTOR IS PROTECTED BY ELEVENTH AMENDMENT IMMUNITY WHERE THE ENTIRE PURPOSE OF THE SUIT IS TO AFFECT AND INTERFERE WITH THE COURSE AND OUTCOME OF PROSECUTION.

It must be pointed out here that based on the earlier arguments that Petitioner has no constitutionally protected rights to notification, her reliance on Ex parte Young, 209 U.S. 123 (1908) is unfounded, Petitioner's second and third arguments are moot and this honorable Court should deny the petition for certiorari on this basis.

Notwithstanding this, it is settled law that a prosecutor is absolutely immune from suit for 42 U.S.C. Section 1983 claims when that prosecutor acts within the scope of his or her prosecutorial duties. In the case before us, the prosecutor was acting well within the scope of her duties and, regardless of whether or not she notified Petitioner of the reduction hearing, is absolutely immune from suit in this matter.

The seminal case in this matter, Imbler v. Pachtman, 424 U. S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976), reviewed the issue of prosecutorial immunity at common law. The Court found that this common law immunity from tort claims was equally applicable to Section 1983 suits. In holding that a prosecutor, "enjoys absolute immunity from Section 1983 suits for damages when he acts within the scope of his prosecutorial duties;" 424 U. S. at 420, "in the performance of the duties imposed on him by law," 424 U. S. at 422, quoting Yaselli v. Goff, 12 F. 2d 396, 406 (1926), the Court also stated:

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own po-

> tential liability in a suit for damages.... Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law," 424 U. S. at 424-5.

While the Court's discussion was aimed specifically at the "intolerable burden" of defense of Section 1983 claims brought by an indicted or convicted criminal, it is self-evident that the burden of defending oneself from an entirely new, unexpected and tangential entity, the victim's family, could be even more intolerable in terms of sheer numbers and kinds of actions.

Imbler holds that in initiating and pursuing a criminal action, a prosecutor must have absolute immunity from suit. Petitioner claims that the asserted failure to notify her of the date, time and place

of the reduction hearing was an administrative act on the part of the prosecutor and which is subject to the immunity defense. Of course, it appears from the evidence that both Petitioner and her counsel were notified pursuant to statute. Even if this were untrue, however, it also appears from the evidence and argument of counsel that Petitioner's sole goal here and below was to affect prosecution of the Bator matter.

In his fax of September 26, 1991, Petitioner's counsel states at least two things: 1) that he was aware of the hearing scheduled September 27, 1991, (otherwise there was no need to fax the letter and no need to "vehemently oppose" any further action prior to October 2, 1991) and, 2) that the family intended to force the judge and prosecutor to send the matter to the Mahoning County Grand Jury on September 27,

1991, see attachment to Defendant's Motion for Summary Judgment, Docket #16. Also, in her Complaint at paragraph 7, Petitioner states she intended to object to the plea bargain arrangement, a reduction of charges Petitioner considered "inappropriate," Complaint paragraph 16. She expressed a desire to vacate this plea bargain and instead have the prosecutor and the judge bind Bator over to the Grand Jury, paragraphs 16 and 17. From this it can be seen that far from Petitioner objecting to a duty she believes merely administrative, her entire thrust, entire goal is to interfere with the ongoing criminal prosecution of Eric Bator.

The prosecutor is immune from suit where Petitioner attempts to interfere with a criminal prosecution. In Joseph v. Patterson, 795 F. 2d 549 (6th Cir. 1986),

cert. den. 481 U. S. 1023 (1987), the prosecutor was held immune in a case which stemmed from the prosecutor's decision whether or not to prosecute. In Taylor v. Kavanagh, 640 F. 2d 450 (2nd Cir. 1981) the prosecutor was absolutely immune from a Section 1983 action resulting from a plea bargain arrangement. In Burns v. Reed, 500 U. S. ___, 114 L. Ed. 547, 111 S. Ct. 1934, 1955-57 (1991), a search warrant matter, the Supreme Court reaffirmed previous cases which held that absolute immunity attaches to a prosecutor's actions where they are closely connected with the judicial phase of the process, pointing out that immunity traditionally extended to all hearings held before a judicial tribunal.

The Ohio statute itself supports the proposition that the notification provision is a prosecutorial duty. Despite Peti-

tioner's assertion that notification "implicates neither advocatory nor adjudicatory functions," Petitioner's petition page 16, the notification provision states that if the next of kin provides the mandatory written information, notification of the date, time and place of the trial, plea or hearing on final disposition should be given. At each of the above instances, the prosecutor is an active, participating character in the ongoing prosecution of the case. In fact, the prosecutor is involved far more intimately in a plea reduction hearing than a search warrant hearing, see Burns. It is only after all three of these enumerated occasions occur that the prosecutor's duties to pursue and process a criminal matter are virtually ended.

As Petitioner's admitted goal was to stop the prosecutor and judge from accepting a plea agreement and force these two state actors to relinquish prosecution to the county grand jury, the giving of statutory notice does indeed "involve decisions whether, how or whom to prosecute," Petitioner's petition, page 17. Nowhere is that more clear than in the fact pattern of the instant case.

III. A CITY MUST BE DISMISSED FROM A SUIT FILED UNDER 42 U.S.C. SECTION 1983 WHERE THE ONLY ALLEGATIONS AGAINST IT ARE THOSE BASED ON THE THEORY OF RESPONDENT SUPERIOR.

Contrary to Petitioner's arguments, she was barred from relief against the City of Youngstown because she failed to allege any wrongdoing on the part of the City, specifically. All of Petitioner's claims against the City are solely to be derived from its allegations against the local prosecutor. The lower courts, recognizing this, dismissed those claims against the municipality.

In her briefs before the lower courts, Petitioner for the first time raised "failure to train" allegations against the supervisor of the local prosecutor, the Youngstown City Law Director. The Law Director is not a party to suit. The Law

Director is never even given passing mention in the Complaint. Never, not once in her several page Complaint, does Petitioner raise any cognizable claim against the City except as may be gleaned from the allegations of wrongdoing on the part of the prosecutor and the municipal court judge, who is also not a party and who is clearly an employee of the State of Ohio. Petitioner, once a summary judgment motion was filed pointing out this failure, could have requested the District Court's permission to amend the Complaint so as to add its specific allegations of "failure to train." Petitioner did not. Petitioner's claim was not filed pro se and does not get the benefit of liberal construction. Even so, there is absolutely no indication in the Complaint that Petitioner was raising "failure to train" issues.

Petitioner did not specifically state that her claims against the City were based on respondeat superior, either. No claim against the City was specifically plead. This claim can be reasonably construed from the Complaint, however, as there is no other claim upon which Petitioner bases her case. The lower courts were entirely correct in granting the City summary judgement as to these allegations. Even if the City admits each and every allegation in the Complaint, under Monell v. Department of Social Services, 436 U. S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), no claim may lie against the City.

Monell is dispositive of the issue that a municipality is not liable in respondeat superior for actions of its employees or officials; in order to state a valid claim against a city a plaintiff must

both plead and prove the existence of a custom or policy of violating an individual's rights, 436 U. S. 658 at 691-2. Petitioner failed to do either. It is for this reason that the City was properly dismissed in this matter.

CONCLUSION

Petitioner is improperly attempting to invoke jurisdiction of this honorable Court. This matter presents no "special and important reasons" pursuant to Rule 10 of the Rules of the Supreme Court why this matter should be reviewed. The Sixth Circuit decision here in no way conflicts with any other United States Court of Appeals and fully comports with the holdings of this honorable Court. Contrary to the statements made in Petitioner's petition here, this matter is entirely fact-based and the decisions below reflect both the unique factual considerations of this case and the procedural errors on the part of Petitioner. No constitutional rights are involved in this matter, no conflicts exist and Respondent respectfully

urges this honorable Court to overrule the Petition for Writ of Certiorari.

Respectfully submitted,

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